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No. 07-1356

IN THE
Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE FUNDAMENTAL PURPOSE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS TO ENSURE A FAIR TRIAL THROUGH AN ADVERSARY PROCESS, WHICH OCCURRED IN THIS CASE.

A. Both parties and all amicus curiae in this case agree that the fundamental purpose of the Sixth Amendment right of a defendant "to have the Assistance of Counsel for his defence," U.S. CONST. amend. VI, is to ensure a fair trial through an adversary process. "[T]he core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Cronic*, 466 U.S. 648, 654 (1984). Respondent received precisely such assistance and a fair trial.

First, counsel fully assisted Respondent in his defense in the adversary trial setting. Doser's testimony was offered only after Respondent testified that he did not shoot the murder victim. Joint Appendix ("J.A.") at 142–143. Respondent's counsel confronted and fully cross-examined Doser, exploring whether law enforcement officials, other inmates, or anyone else told Doser anything about Respondent's alleged crimes before Doser and Respondent were placed together, what instructions law enforcement agents gave to Doser, and whether Doser received any benefit in exchange for his assistance to law enforcement. *Id.* at 151–155.

Second, the trial judge, as is commonly done, gave the jury a cautionary instruction, directing them that "[y]ou should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence." J.A. at 30.

Finally, the ultimate proof that Respondent received a fair trial is in the result: the jury acquitted Respondent of the murder charge, the most serious charge to which Doser's testimony was relevant. By any objective measure, Respondent received a fair trial on the murder charge with "the Assistance of Counsel for his defence."

B.1. Respondent and his amicus seek a rule of total exclusion that would skew rather than promote fair trials. Only by ignoring (1) the fundamental goal of seeking the truth in criminal trials and (2) the risk of perjury by criminal defendants, can Respondent and his amicus argue for such a rule. The Court, in contrast, repeatedly has emphasized "the enormous social cost of excluding truth in the search for truth in the administration of justice," *Nix v. Williams*, 467 U.S. 431, 445 (1984), and that a "criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

The Court has applied a rule of total exclusion when constitutional text, in particular the Fifth Amendment prohibition against self-incrimination, compels such a result. *See*, *e.g.*, *New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979). As a general

matter, however, in determining the scope of the exclusionary rule—irrespective of whether the case involves a Fourth Amendment, *Miranda*, or Sixth Amendment violation—the Court has engaged in a balancing analysis, weighing the costs of exclusion against its benefits. Furthermore, the Court consistently has concluded that such an analysis requires the exclusion of unlawfully obtained evidence from the government's case in chief, but not for impeachment purposes when a defendant testifies inconsistently with prior statements or other evidence.

Nothing in the Sixth Amendment or any other constitutional provision defines what it means "to have the assistance of counsel." The Court has held that, "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." *Michigan v. Harvey*, 494 U.S. 344, 348 (1990). But the Court also has held that the right to counsel does not include a right to assistance in presenting perjured testimony, *Nix v. Whiteside*, 475 U.S. 157, 174–75 (1986), and that statements elicited in violation of the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), nonetheless may be used for impeachment if the defendant testifies inconsistently with his prior statements. *Harvey*, 494 U.S. at 351–52.

2. Importantly, unlike the Fifth Amendment prohibition against self-incrimination, nothing in the Sixth Amendment suggests that complete exclusion

of a defendant's voluntary statements made outside the presence of counsel is either necessary or proper to ensure a fair trial. To the contrary, in previous Sixth Amendment right to counsel cases, as well as in Fourth Amendment and *Miranda* cases, the Court *always* has engaged in a cost-benefit balancing analysis to determine the scope of the exclusionary rule. Apart from the extremely narrow set of cases involving compulsion or involuntary statements, the Court has *never* adopted a rule of total exclusion. Instead, the Court consistently has permitted the use of relevant, probative evidence to impeach a defendant who testifies in conflict with his own prior statements or other evidence against him.

The balancing analysis is by now familiar and well-established. The Court balances the benefits of exclusion (deterring future police misconduct) against the costs (*e.g.*, countenancing perjury, keeping the truth from the jury, setting the guilty free) to determine whether the exclusionary rule should apply and, if so, to what extent.

For Sixth Amendment purposes, the application of the cost-benefit balancing analysis is water already under the bridge, with the Court having engaged in precisely such an analysis in both *Michigan v. Harvey* and *Nix v. Williams*. *See* 494 U.S. at 350–53; 467 U.S. at 442–48. Further, in those cases the Court rejected a remedy of total exclusion, explaining that such a draconian rule "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the

administration of criminal justice." *Nix v. Williams*, 467 U.S. at 447.

In *Harvey*, the Court held that statements elicited in violation of the *Jackson* rule remain admissible for impeachment, even though the situation in *Harvey* presents far more potential for police misconduct than in the *Massiah v. United States*, 377 U.S. 201 (1964) context. In the *Jackson/Harvey* situation, the police directly initiate contact with the defendant and actively seek a waiver of the defendant's right to counsel. In that setting, there is at least the potential for police coercion or intimidation. That is not the case when an informant elicits statements from a defendant, as Respondent acknowledges when he argues that defendants "may be fooled" by informants into saying they committed a crime. Resp. Br. at 15. Respondent's invitation to adopt a rule of total exclusion here and jettison the cost-benefit balancing analysis is not justified by either constitutional text or precedent.

C. Finally, contrary to Respondent's suggestion, there are not significant reasons to distinguish *Massiah* violations from Fourth Amendment, *Miranda*, and *Jackson* violations. In all of the latter situations, the Court has applied the balancing analysis and held that improperly obtained evidence can be used for impeachment purposes if and when a defendant testifies inconsistently with his prior statements or other evidence against him.

Evidence obtained from Fourth Amendment, *Miranda*, and *Jackson* violations "functionally t[ies] counsel's hands before the parties even walk through

the courtroom doors," Resp. Br. at 18, just as much as a *Massiah* violation. Indeed, the similarities between the former violations, on the one hand, and a *Massiah* violation, on the other, are far greater than their differences. All of these violations involve the government obtaining evidence unlawfully. All of the evidence obtained through such violations can aid the government in obtaining a conviction. And all such evidence can make it more difficult for defense counsel to achieve a not guilty verdict or a lesser sentence.

Any differences between these violations are far less than Respondent claims. Certainly, *Miranda* and *Jackson* were decided with future trials in mind, and not for the purpose of protecting independent, exogenous constitutional interests such as the privacy rights that the Fourth Amendment protects. And, like the Fourth Amendment but unlike the Fifth Amendment, the Sixth Amendment's text does not dictate exclusion as a remedy for violations.

The Court's numerous cases permitting the use for impeachment purposes of evidence obtained in violation of *Miranda* and *Jackson*, as well as the Court's prior application of the balancing analysis in Sixth Amendment cases such as *Michigan v. Harvey* and *Nix v. Williams*, strongly supports Kansas in this case. The Court here should hold once again that "the interests safeguarded by the exclusionary rule . . . [are] outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone v. Powell*, 428 U.S. 465, 488 (1976).

II. THE COSTS OF EXCLUDING, FOR ALL PURPOSES, RELEVANT AND PROBATIVE VOLUNTARY STATEMENTS UNLAWFULLY OBTAINED FAR OUTWEIGH ANY MARGINAL BENEFIT IN DETERRING GOVERNMENT MISCONDUCT.

A. Significant Incentives Already Exist For Police And Prosecutors To Follow The Law.

Respondent and its amicus appear to endorse the propositions that no prosecutor is to be trusted and that all police seek to violate constitutional standards whenever doing so might result in obtaining evidence that may be useful in some way at some time. *See*, *e.g.*, Resp. Br. at 16; NACDL Amicus Br. at 20. The truth, however, is much more complicated than that, and there already exist several significant deterrents to police and prosecutorial misconduct.

1. First, as the Court has said in other contexts, such as describing the anticipated behavior of the States and state judges, there is a presumption that the States and their officials will act in good faith to follow and uphold the Constitution. *See*, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that" federal standards will be followed); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) ("we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"). The Court has never

assumed, nor should it, that state prosecutors systematically and intentionally violate, or encourage police to violate, a defendant's constitutional rights.

Rather, the Court long has assumed that prosecutors follow the Constitution and the rules of professional ethics, and that ethical standards and professional discipline in particular will act as a significant deterrent to prosecutorial misconduct. *See*, *e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 427, 429 (1976). Similarly, the Court recently recognized that police professional standards and discipline create important incentives for police to follow the law, much more so than when the Court first adopted the exclusionary rule decades ago. Combined with much stronger professional training and supervision than once may have been the case, police professional norms and discipline provide significant protection against police misconduct. *See Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006). Indeed, there is no evidence in this case of either prosecutorial or police bad faith or improper motives. Here, at worst, the informant failed to follow his instructions carefully.

2. As explained previously, there are strong incentives to follow the law in this context. Kansas Br. at 25. Because placing an informant in a cell to act as a "listening post" does not violate the Sixth Amendment right to counsel *at all*, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), any statements obtained from a defendant in that scenario will be admissible for *all* purposes. Having a defendant's inculpatory statements available for use in the government's case in chief is far more helpful than (1) purposefully

violating the *Massiah* rule (2) in the hope of obtaining something that might be useful (3) if and only if the defendant both (a) actually testifies at trial and (b) does so inconsistently with statements previously made to an informant.

3. There may be disagreement among the parties and amici in this case regarding the availability of a suit under 42 U.S.C. § 1983 for a *Massiah* violation. In its opening brief, Kansas asserted that Section 1983 might be invoked against police officers involved in a *Massiah* violation, as well as against a municipality if police or prosecutors were acting pursuant to an "official policy or custom" in committing *Massiah* violations. *See* Kansas Br. at 25–28.

Respondent and the United States appear to take the position that the Sixth Amendment is not violated until any statements obtained from the defendant in violation of *Massiah* actually *are introduced at trial*. U.S. Amicus Br. at 28 n.7; Resp. Br. at 21. That position suggests that police alone could never violate the Sixth Amendment right to counsel, though they might participate in such a violation.

It is unnecessary to decide the question of precisely when a Sixth Amendment violation occurs in order to resolve this case. If the violation is complete at the time police use an informant to deliberately elicit incriminating statements from a defendant, then the deterrence logic that justifies limiting the exclusionary rule to the government's case in chief with respect to Fourth Amendment and

Miranda violations is directly applicable here, because Section 1983 liability will be a deterrent to police misconduct. If, on the other hand, the violation is not complete until the elicited statements are introduced at trial, then the logic that supported limiting the exclusionary rule in *Michigan v. Harvey* is directly applicable. Either way, there is no justification in the Constitution or the Court's cases for treating a *Massiah* violation like the narrow and unique category of compelled or involuntary statements.

In any event, even if Section 1983 will not support a claim against police here, many other important deterrents indisputably exist, making a rule of total exclusion unnecessary as a deterrent measure. Such deterrents include the prohibition on using the defendant's statements in the government's case in chief, the existence of professional ethics rules and the prospect of professional discipline, and the threat of municipal liability even if prosecutorial misconduct is protected by absolute immunity (municipalities have no immunity in Section 1983 cases). Importantly, police and prosecutors have a strong incentive to follow the rule of *Kuhlmann* when utilizing informants because adherence to the law will permit the government to use a defendant's voluntary statements for all purposes, including in its case in chief, not just as impeachment.

B. Total Exclusion Of Informant Testimony Would Prevent The Jury From Hearing Often Relevant, Probative, And Reliable Evidence While Permitting Criminal Defendants To Commit Perjury.

Respondent's amicus, and to a great extent Respondent himself, suggest in essence that informants are inherently unreliable and that their uncorroborated testimony should be *per se* inadmissible, or else subject to special evidentiary and procedural rules. Such claims are radical, running contrary to two centuries of American (and even longer British) reliance upon cross-examination in an adversary process before a jury to determine the credibility of testimonial evidence in pursuit of the truth in criminal cases. *See, e.g.*, 5 J. Wigmore, *Evidence* § 1367 p.32 (J. Chadbourn rev. 1974) (cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth").

Not surprisingly, the Constitution provides no basis for such special rules, and the Court long ago rejected any such proposition. Indeed, Sixth Amendment right to counsel cases such as *Massiah* and *Kuhlmann* stand in direct contradiction of the argument. In none of those cases did the Court even suggest, much less hold, that informant testimony is inherently unreliable. To the contrary, the Court long has recognized that such evidence is admissible, subject to the normal rules of evidence, cross-examination, and trial procedure.

In fact, informant testimony regarding voluntary statements a defendant has made to a person the

defendant believed (erroneously) to be a friend, ally, or confidante, may be extremely reliable. Furthermore, informants often have no prior knowledge of the crimes with which a defendant is charged, or the circumstances of those crimes, prior to talking with the defendant, making it impossible for them to fabricate the substance of a defendant's statements to match non-existent prior knowledge of the crime and its circumstances. In this case, Doser testified, on cross-examination, that the police did not tell him that Respondent was charged with murder, nor had he heard such information from other inmates, from visitors, or from any other source prior to his conversations with Respondent. J.A. at 151–152.

Further, there are reasons to think that statements made to informants may be even *more* reliable than statements elicited by direct police interrogation, where the possibility of coercion or intimidation may exist. Nonetheless, in *Michigan v. Harvey*, the Court held that statements obtained directly by the police in violation of the *Jackson* rule remain admissible for impeachment purposes. The logic and circumstances of *Harvey* effectively foreclose any argument for a different exclusionary rule for a *Massiah* violation, where there is not even a possibility of official coercion or intimidation because the defendant believes he is speaking to a friend or ally, and no threats of any kind have been or will be made.

Jailhouse informants themselves have incentives not to be aggressive or too active in questioning

cellmates. Jails can be dangerous places, and being discovered as a government informant could have significant, negative consequences, a fact of which Doser was well aware in this case. *See* J.A. at 155 ("I didn't want to push for any information. I didn't want to subject myself to being injured.") Thus, informants, too, have significant incentives to follow *Kuhlmann* rather than violate *Massiah*.

To the extent Respondent and his amicus argue that informants are inherently unreliable, they actually bolster the Court's longstanding concern about perjury by criminal defendants. By necessity, jailhouse informants themselves are criminal defendants. If such informants are inherently unreliable, logic suggests that criminal defendants as a group may be inherently unreliable. Certainly, it is not lost on juries (nor has it ever been lost on the Court) that criminal defendants may have incentives to be less than forthcoming or candid when they testify in their own defense. That is a basis for the Court's repeated warnings about condoning or encouraging perjury, and a fundamental reason for jury trials—to permit a cross-section of citizens to evaluate the credibility of *all* witnesses, including criminal defendants.

Moreover, it is common for trial judges to instruct the jury, as the trial judge did in this case, to evaluate an informant's testimony with caution, particularly when the informant has received a benefit from the government in exchange for testifying. There is no constitutional basis for

imposing additional restrictions or more severe and unique limitations on informant testimony.

III. THE ALTERNATIVE PROPOSALS THAT RESPONDENT AND HIS AMICUS OFFER ARE FUNDAMENTALLY FLAWED.

As an alternative to a rule of total exclusion, Respondent proposes that statements obtained in violation of the *Massiah* rule be admissible only "when necessary to prevent intentional false testimony." Resp. Br. at 26. His amicus offers a different alternative, namely that such a statement be admissible "only if it satisfies a basic reliability requirement: corroboration." NACDL Amicus Br. at 26. These "alternative" proposals are fundamentally flawed, run contrary to two centuries of American jurisprudence and, if adopted, would prove to be a "cure" with far worse consequences for the criminal justice system than any current perceived problems with informant testimony.

Respondent's alternative proposal effectively acknowledges that perjury by criminal defendants is a serious concern, and that impeachment of at least some criminal defendants who testify is critical to protecting the integrity of the criminal justice system. But even cursory consideration of the proposed alternative demonstrates that the only workable and constitutionally justified approach is to permit impeachment whenever a defendant testifies and the informant's testimony will contradict the defendant, just as the Court has held repeatedly in the Fourth Amendment, *Miranda*, and *Jackson* cases.

Fundamentally, the alternative proposals invite this Court to create special, unique rules on the basis of policy judgments, not constitutional requirements. There are two centuries of American jurisprudence in place to deal with informant testimony, as demonstrated by this case. Here, Respondent's counsel had information regarding any benefits Doser received from the government for his testimony, was able to cross-examine Doser aggressively on a variety of topics, and the trial judge gave the jury a cautionary instruction regarding informant testimony. These rules and measures protected Respondent's rights in this case, just as they long have been deemed adequate to protect criminal defendants' rights in general. Indeed, such measures proved quite effective here. Given the opportunity to assess Doser, the jury apparently did not believe him, at least not beyond a reasonable doubt, because it acquitted Respondent of murder, the primary charge Doser's testimony addressed.

Further, there is no constitutional "corroboration" requirement applicable to criminal defendants' testimony, though Respondent and his amicus must acknowledge that, by definition, informants placed in cells with defendants generally are themselves criminal defendants. Surely Respondent and his amicus are not intending to suggest that all criminal defendants are inherently unreliable and untrustworthy. If that is their suggestion, then any rule applied to informants logically should be extended also to criminal defendants generally. Because the right of a defendant to testify does not

include the right to commit perjury, the logic of the amicus alternative proposal is that the courts should require "corroboration" before a criminal defendant is permitted to testify.

Respondent and his amicus are inviting this Court to create unique new rules for informant testimony without any basis in constitutional text, history, or precedent. Equally important, it is not at all obvious that the alternatives are workable or would improve rather than undermine the criminal justice system. For example, under Respondent's proposal, would a trial court have to hold a mini-trial—putting the main trial on hold—to hear evidence to determine whether the defendant committed perjury during his trial testimony (in order to decide, under Respondent's alternative, whether the prosecution could then use the testimony of an informant to contradict the defendant's "perjury")? Would such a proceeding itself have to be conducted with a jury which, after all, is charged with determining the credibility of witnesses in our constitutional system? Moreover, by what standard of proof would the trial court have to determine that a defendant's testimony was perjurious? And would a finding that perjury had been committed be given collateral estoppel effect in a subsequent criminal prosecution for perjury? These questions are merely illustrative, and hardly exhaustive, of the many problems and complexities that Respondent's alternative proposal would create.

Similarly, adopting a "corroboration" alternative also would create complex and difficult questions.

Respondent's amicus necessarily cannot really answer questions such as what would constitute sufficient "corroboration" to justify the admission of informant testimony, or when and how a trial court would determine whether such corroboration existed. Indeed, Respondent's amicus acknowledges that existing corroboration policies have been created by state legislatures and prosecutor offices as a matter of policy, not by courts as a matter of constitutional law. *See* NACDL Amicus Br. at 26–27 (citing Texas law and Los Angeles District Attorney policy).

In recent years, particularly in the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), line of cases, the Court has emphasized the primary and fundamental role that juries play in determining the critical facts in criminal cases. Respondent and his amicus seek to create rules of law that limit the jury's ability both to hear witnesses and to evaluate fully the credibility of those witnesses. Furthermore, there is no suggestion in this case that the jury was somehow fooled or duped by the prosecution; indeed, it appears that the jury was skeptical of Doser's testimony because it in fact acquitted Respondent of the murder charge, the focus of Doser's testimony.

Ultimately, there is no reason to think that the traditional safeguards—among them disclosure of any benefits an informant receives from the government, an opportunity by defendant's counsel for vigorous cross-examination of an informant, cautionary jury instructions by the trial judge, and faith in a jury's ability to judge credibility—are insufficient to protect against untruthful informant

testimony. The Court need not and should not accept the invitation of Respondent and his amicus to substitute unproven policy judgments for settled jurisprudence.

IV. THIS CASE AND THE ISSUE PRESENTED ARE PROPERLY BEFORE THE COURT.

A. Respondent, as he did in his Opposition to the Petition for a Writ of Certiorari, at 9–12, raises the state law question whether he can be retried in the Kansas courts in the event this Court were to affirm the Kansas Supreme Court decision. Resp. Br. at 4, n.1. That question already has been answered in the State's favor by the state trial court, *see* Reply to Opposition to Petition for a Writ of Certiorari ("Reply to Opp."), at 1a–3a, presents only issues of Kansas law, and has no effect on the Court's jurisdiction to decide the Sixth Amendment issue.

The Court had before it the relevant information and authority regarding jurisdiction when the Court decided to grant Kansas's petition for a writ of certiorari, *see* Reply to Opp. 4–6, and the Court's grant, at a minimum, implicitly rejected Respondent's suggestion that his state law claim is relevant to the Court's jurisdiction. Kansas filed its timely petition for a writ of certiorari on April 28, 2008, well before the Kansas Speedy Trial Act clock would have run even under Respondent's erroneous view of Kansas law. The Court has jurisdiction.

Nor is there any question of mootness here. A decision in favor of Kansas will reinstate Respondent's convictions or, at a minimum, require further proceedings in the state courts to determine if

other grounds exist to preclude reinstatement. A decision in favor of Respondent will simply return the case to the trial court where Respondent can litigate the state law speedy trial act claim that he asserts precludes another trial (a claim which the trial court already has rejected). Either way, this Court's decision on the Sixth Amendment issue will matter.

B. Respondent also erroneously suggests that "Petitioner and its amici" are challenging Kansas' concession in the lower courts that a violation of Respondent's Sixth Amendment right to counsel occurred. Resp. Br. at 17, n.2. Kansas has not challenged the concession made in the state courts or the merits of the rule of *Massiah v. United States*, 377 U.S. 201 (1964). *See* Kansas Br. 18–19, n.* ("the prosecutors throughout the state courts assumed there was a violation, and Kansas does not challenge that assumption here"), 34 ("Kansas is not challenging [the *Massiah*] rule").

That said, a party's concessions do not make binding constitutional precedent. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (internal citations omitted); *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478–79 (2006) (same). Kansas and the United States have simply pointed out that the State's concession below may have been ill-advised (relying as the prosecutors

apparently did upon Kansas precedent no longer valid in light of the Court's decision in *Kuhlmann*), a point also made by the Chief Justice of Kansas in her dissenting opinion below. *See* Pet. App. 35a–37a. It is neither necessary nor appropriate for the Court to revisit the State's concession now, and Kansas does not ask the Court to do so.

The facts of this case may well demonstrate the vagaries of, and difficulties in applying, the constitutional lines that the Court has drawn in *Massiah* and *Kuhlmann*, as well as the tension that may exist between cases such as *Kuhlmann* and *United States v. Henry*, 447 U.S. 264 (1980). Ultimately, however, it is unnecessary to consider whether the facts below establish a Sixth Amendment violation. Because Kansas has conceded the question, both in the state courts and in this Court, the sole "issue here is remedy." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

* * * * *

At bottom, this case distills to one essential question: for exclusionary rule purposes, is there justification in constitutional text or the Court's cases for treating a *Massiah* violation differently than Fourth Amendment, *Miranda,* and *Jackson* violations? For the reasons set forth above and in Kansas's opening brief, the answer is "No."

Instead, this case should be resolved by applying the well-settled, cost-benefit balancing analysis that the Court consistently has relied upon in all exclusionary rule cases other than the narrow,

unique set involving compelled or involuntary statements. Here, the balance strongly favors limiting the scope of the exclusionary rule for *Massiah* violations to the government's case in chief. Precluding impeachment use of such evidence imposes too great a cost on the integrity of the judicial system by condoning perjury, a cost far in excess of any resulting marginal deterrent effect on official misconduct. For exclusionary rule purposes, a *Massiah* violation is in the same category as Fourth Amendment, *Miranda*, and *Jackson* violations.

CONCLUSION

The decision of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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